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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN '92, RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, permits the Federal Election Commission to determine that a candidate's statutorily required promises are insufficient to establish his eligibility to receive a public subsidy for his campaign, where there is a record of his having repudiated those same promises and submitted false documentation in four previous campaigns and he has been convicted and imprisoned for conspiring to defraud both another federal agency and his own private contributors.

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PETITION FOR A WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in '92 v. Federal Election Commission*, 996 F.2d 1263 (D.C. Cir. 1993).

OPINION BELOW

The July 2, 1993, decision of a panel of the court of appeals, one judge dissenting in part, reversed the Commission's final determination that Lyndon LaRouche had failed to establish

his eligibility for matching payments for the 1992 election cycle under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 ("Matching Payment Act" or "the Act"). The court's opinion is reported at 996 F.2d 1263 (D.C. Cir. 1993), and is reprinted as Appendix A (App. 1a-18a) of the Commission's separately bound volume of appendices. The Commission's statement of legal and factual reasons in support of its determination appears in Appendix B (App. 19a-58a).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 2, 1993. Under the Matching Payment Act, 26 U.S.C. § 9041(a), that court had jurisdiction to review the Commission's final determination. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case concerns provisions of the Presidential Primary Matching Payment Account Act, particularly 26 U.S.C. § 9033, establishing requirements for a candidate's eligibility for matching funds. For the Court's convenience, the Matching Payment Act and key regulations implementing the Act are set forth as Appendix C (App. 60a-74a) and Appendix D (App. 75a-101a) respectively. Relevant provisions of the statute establishing the Commission, the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("the FECA"), are set out in Appendix E (App. 102a-119a).

STATEMENT OF THE CASE

A. The Federal Election Commission

The Commission is the independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Matching Payment Act, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the FECA. Congress empowered the Commission to "formulate policy with respect to" all these statutes, 2 U.S.C. § 437c(b)(1), gave it broad authority to administer these laws, *see, e.g.*, 2 U.S.C. §§ 438(a) and (b), 26 U.S.C. §§ 9005, 9007, 9036, and 9038, and authorized it to make "such rules . . . as are necessary to carry out the provisions" of the statutes it administers, 2 U.S.C. §§ 437d(a)(8), 438(a)(8). Specifically, the Commission is "authorized to prescribe rules and regulations . . . and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities" under the Matching Payment Act. 26 U.S.C. § 9039(b).

B. The Matching Payment Act

The Matching Payment Act, enacted in 1974, provides limited public funding of presidential primary campaigns by authorizing federal matching payments for certain small contributions to eligible candidates. A presidential primary candidate bears the burden of establishing his or her eligibility for this public funding. *See* 26 U.S.C. §§ 9033, 9036(a); 11 C.F.R. Part 9033. As a threshold matter, a candidate must demonstrate and "certify" that (1) the candidate is seeking nomination by a political party for election to the office of President of the United States, (2) he or she has received matching contributions that, in the aggregate, exceed $5000 from residents of each of at least 20 states and that no individual has contributed more than $250, and (3) the candidate's autho-

rized campaign committees will not incur qualified campaign expenses in excess of the limitations on such expenses under 26 U.S.C. § 9035. *See* 26 U.S.C. § 9033(b).

In addition to this "threshold submission," the candidate must also, *inter alia*, promise in writing that the candidate and his or her presidential campaign committee will fulfill a number of "conditions" to the receipt of public funds. 26 U.S.C. § 9033(a). These conditions include: (1) providing the Commission with any evidence it requests regarding qualified campaign expenses; (2) maintaining and furnishing to the Commission any records or other information it requests; and (3) cooperating in a post-election audit by the Commission, *see* 26 U.S.C. § 9038, and making any repayments required as a result of that audit.

The Commission's regulations provide more detailed requirements for establishing eligibility. *See* 11 C.F.R. §§ 9033-9034.[1] The regulations require that contributions proffered for matching funds reflect the contributor's "necessary donative intent," 11 C.F.R. § 9034.3(i), and specify that the Commission will look beyond the face of a threshold submission if necessary, including conducting "further inquiry" into any

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[1] For example, the candidate must agree that he or she will: (1) keep and furnish to the Commission all documentation for matching fund submissions, including any books, records and supporting documentation and other information that the Commission may request; (2) prepare matching fund submissions in accordance with the Commission's *Guideline for Presentation in Good Order*; (3) comply with the contribution limits and other applicable requirements of the FECA, 2 U.S.C. § 431 *et seq.*, and the Commission's other regulations; and (4) pay any civil penalties included in a conciliation agreement between the Commission and the candidate's campaign committee under 2 U.S.C. § 437g. 11 C.F.R. §§ 9033.1(b)(2), (b)(4), (b)(5), (b)(8), (b)(9), and (b)(10). *See also* 11 C.F.R. §§ 9033.9 and 9033.11; Final Rule on Public Financing of Presidential Primary and General Election Candidates, 56 *Fed. Reg.* 35,896, 35,904 (July 29, 1991).

submission, if it determines "that additional information must be obtained," 11 C.F.R. § 9039.3(a)(1). The regulations also provide that the Commission may consider, in addition to the threshold submission, other information in its possession, including the candidate's past actions in prior publicly-financed campaigns, in evaluating the candidate's eligibility for matching funds. 11 C.F.R. § 9033.4(b).[2] If the Commission finds "patent irregularities suggesting the possibility of fraud in materials submitted by, or in the activities of, the candidate or his or her authorized committee(s)," matching payments may be withheld pending the results of the inquiry. 11 C.F.R. § 9039.3(a)(3).

Upon receipt of the candidate's threshold submission, candidate agreement, and any other necessary information, the Commission makes a determination of eligibility for public matching funds. If the Commission determines that the candidate has established his or her eligibility for public financing under the Act, matching payments are paid directly to the candidate,[3] who is personally responsible for these public funds. *See* 26 U.S.C. §§ 9036-9038. If the Commission concludes that the candidate has not established his or her eligibility, it makes an initial determination of ineligibility and provides the candidate with a statement of legal and factual reasons for the determination. 11 C.F.R. § 9033.10(b). The

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[2] Examples of factors that the Commission may consider include a candidate's repudiation of an earlier candidate agreement, or the appearance of patent irregularities suggesting the possibility of fraud in earlier matching fund submissions that seem to be recurring in the new request for certification. *See Explanation and Justification of Title 26 Regulations*, 52 *Fed. Reg.* 20,864, 20,868-69 (June 3, 1987).

[3] No later than ten days after a candidate establishes his or her eligibility, the Commission "shall certify to the Secretary [of the Treasury] for payment to such candidate . . . payment in full of amounts to which such candidate is entitled." 26 U.S.C. § 9036(a).

candidate is then given an opportunity either to satisfy the requirements the Commission has found lacking or submit a legal and factual statement to demonstrate that he or she has, in fact, met all requirements. 11 C.F.R. § 9033.10(c). If, after this review, the Commission makes a final determination of ineligibility, it provides a statement of legal and factual reasons explaining this determination. *Id.* A candidate may file a petition for rehearing of such a final determination, *see* 11 C.F.R. § 9033.10 (e) and 11 C.F.R. § 9038.5(a), and may seek review of the Commission's determination in the United States Court of Appeals for the District of Columbia Circuit, 26 U.S.C. § 9041(a).

C. LaRouche's History of Fraudulent Campaign Financing Activity

Lyndon H. LaRouche, Jr., has been a presidential candidate in each election since 1976 and has sought federal matching funds under the Matching Payment Act for each campaign. Although he submitted the required candidate agreement in each campaign, each time he either repudiated his promises or engaged in other fraudulent behavior to obtain matching funds.

1. LaRouche's 1976 Campaign

In 1976 Mr. LaRouche certified to the Commission that he had received the requisite number of contributions in 20 states to satisfy the fundraising threshold for public financing, 26 U.S.C. § 9033, but the supporting documentation he submitted contained patent irregularities indicative of fraud. The D.C. Circuit upheld the Commission's rejection of LaRouche's matching fund submission after an investigation revealed that a number of the contributions he had submitted were falsified. *See Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 847-848 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). *See also, Jones v. Unknown Agents of FEC*, 613 F.2d

864, 871, 872-73 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). (App. 29a-30a, 34a-36a.)

2. LaRouche's 1980 Campaign

In 1980, the Commission certified Mr. LaRouche eligible for $526,000 in matching funds. The post-election audit required by 26 U.S.C. § 9038 revealed a host of violations of the Matching Payment Act and the Federal Election Campaign Act. An enforcement investigation, conducted under 2 U.S.C. § 437g, resulted in a negotiated conciliation agreement, 2 U.S.C. § 437g(a)(4), in which Mr. LaRouche's campaign committee explicitly admitted committing 79 violations, including 26 specified instances of "knowingly and willfully submitting false and/or misleading information to the Commission in an attempt to obtain matching funds." *See FEC v. Citizens for LaRouche*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 9214, p. 51,713 (D.D.C. 1984). (App. 36a-37a.)

Mr. LaRouche's committee defaulted on its promise in the conciliation agreement to pay a $15,000 civil penalty, refusing even to respond to the Commission's requests for payment. The Commission then filed suit to enforce the agreement against both the committee and Mr. LaRouche, based upon his promise in his matching fund submission that he would pay any civil penalty incurred either by him or by any of his authorized campaign committees. (App. 37a.) *See FEC v. Citizens for LaRouche*, 2 Fed. Election Camp. Fin. Guide at 51,713. Mr. LaRouche responded by explicitly repudiating this promise, arguing that he had altered the wording required by the regulation so that his promise did not "bind[ ] him to an agreement to which he was not a party," *id.* at 51,716. The court rejected this argument, held that "LaRouche is bound by the terms" of his promise, *id.*, and found him "jointly and severally liable for the civil penalty assessed against [the defendant committee]." *Id.* at 51,716-17.

3. LaRouche's 1984 Campaign

In January 1984, Mr. LaRouche submitted a letter to the Commission in support of his application for matching funds in which he promised, as he had in 1980, to make any repayments the Commission found necessary as the result of a post-election audit and to pay any civil penalties imposed upon him or his authorized campaign committees. At the time he was promising to honor those obligations, he was refusing to make the repayments the Commission had ordered after its audit of his 1980 campaign[4] and was repudiating in court his 1980 promise to pay the civil penalties agreed to by his campaign committee, as discussed above. The Commission issued an initial determination that he had not established his eligibility because his "attempt to induce the Commission to certify him to receive public funds, on the basis of promises which he has demonstrated he has no intention to fulfill, constitutes a fraudulent submission" (App. 38a). Two courts later agreed with this determination. *LaRouche v. State Board of Elections*, 758 F.2d 998, 1000 (4th Cir. 1985); *Spannaus v. FEC*, 641 F.Supp. 1520, 1526 (S.D.N.Y. 1986), *aff'd mem.*, 816 F.2d 670 (2d Cir. 1987).

After Mr. LaRouche and his committee paid the outstanding civil penalty and the balance of his 1980 repayment and sub-

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[4] Mr. LaRouche had appealed the Commission's repayment determination to the D.C. Circuit, but he had not sought a stay of the Commission's order pending appeal. In the absence of a stay, repayments are due within 20 days of the Commission's order, 11 C.F.R. § 9038.5, *see Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279, 288, 289 (D.C. Cir. 1983), and LaRouche had agreed to comply with those regulations in his 1980 candidate agreement. Although the D.C. Circuit summarily affirmed the Commission's repayment determination, *Citizens for LaRouche v. FEC*, 725 F.2d 125 (D.C. Cir. 1984), Mr. LaRouche did not repay the sums until several months later, and then only after the Commission made clear that he would not receive matching funds for his 1984 campaign until he did so. (App. 39a-40a.)

mitted an affidavit affirming that he would now accept personal responsibility to fulfill the promises made in his 1984 submission, the Commission agreed to certify him eligible for matching payments. (App. 39a-40a.) However, the post-election audit again turned up evidence of fraudulent fundraising practices, including $35,000 in credit card contributions that were withdrawn from the 1984 campaign's account because the cardholders denied having authorized the contributions. (App. 40a-41a.) The Commission also received complaints directly from individuals who made similar claims that LaRouche's campaign had made unauthorized charges against their credit cards for campaign contributions. *See Spannaus v. FEC*, 641 F.Supp. at 1524-1525. In the ensuing enforcement investigation under 2 U.S.C. § 437g, LaRouche's campaign committee insisted, despite Mr. LaRouche's promise in his matching fund submission that his campaign committee would "keep and furnish to the Commission any records, books, and other information it may request," 26 U.S.C. § 9033(a)(2), that it need not produce its fundraising records because it had engaged Caucus Distributors, Inc., a corporation operated by LaRouche associates, to do its fundraising and thus that those records were not in the campaign committee's possession. (App. 41a.) Even after the bulk of the Commission's subpoena for those documents was judicially enforced, *FEC v. The LaRouche Campaign*, 644 F.Supp. 120 (S.D.N.Y. 1986), *aff'd as modified*, 817 F.2d 233 (2d Cir. 1987), LaRouche's committee continued to refuse to comply. (App. 41a-42a.)

4. LaRouche's 1988 Campaign

When Mr. LaRouche submitted his matching fund request for his 1988 campaign, his record of fraud and refusal to fulfill his promises prompted the General Counsel to recommend that Mr. LaRouche be found not to have established his eligi-

bility for federal funds unless certain special conditions were met. The General Counsel recommended, first, that the candidate and the treasurer of his principal campaign committee be required to submit affidavits containing additional assurances of compliance, and second, that the Commission be given the opportunity to check each contribution in the threshold submission with the purported contributor to confirm that it was actually given as a campaign contribution. (App. 42a-43a.)

Mr. LaRouche's committee asked the Commission to defer consideration of the threshold submission and later entered into an agreement with the Commission that written requests for confirmation would be sent by the Commission to some 1,000 contributors listed in the threshold submission whose checks contained apparent irregularities. In addition, the committee agreed that Mr. LaRouche and his treasurer would submit affidavits accepting personal responsibility for maintaining and delivering campaign records to the Commission. (App. 43a-44a.) Only 713 of the purported contributors responded to the request for confirmation, and 43 of these denied any intention to contribute to Mr. LaRouche's presidential campaign. (App. 44a.)

Despite this evidence of continuing false contribution submissions, the Commission decided not to reject Mr. LaRouche's application for matching funds. Instead, it certified matching payments after Mr. LaRouche submitted the affidavits accepting personal responsibility and additional contributions to satisfy the fundraising threshold. (App. 45a.)

D. LaRouche's Conviction for Fraudulent Fundraising

On December 16, 1988, Mr. LaRouche was convicted by a federal jury in the Eastern District of Virginia on eleven counts of mail fraud, one count of conspiracy to commit mail fraud, and one count of conspiracy to defraud the Internal Revenue

Service, and was sentenced to 15 years in federal prison. The treasurer of his 1984 and 1988 campaign committees and five of his other associates were also convicted on one or more of these counts. (App. 46a.)

Except for the count concerning the IRS, the indictment involved fraudulent fundraising practices engaged in by Mr. LaRouche and his associates. On appeal the Fourth Circuit upheld Mr. LaRouche's convictions on the basis of the evidence that "LaRouche, a candidate for the Democratic Presidential nomination in 1980 and 1984 . . . headed the NCLC [a major LaRouche political fundraising organization]," that "[t]he NCLC . . . carried out many of its activities through commercial corporations and political committees," and that "LaRouche controlled the NCLC, including its fundraising operations and its finances." *United States v. LaRouche*, 896 F.2d 815, 818 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990). The court noted that "LaRouche's dissatisfaction [with the fundraising performance of his associates] also precipitated aggressive fundraising tactics," and cited testimony that "LaRouche characterized adequate fundraising as essential to get him to the White House and without his presence in the White House there was 'no hope for mankind.'" *Id.* at 819. Moreover, he "told [his fundraisers] that 'any means short of thievery or thuggery [was justified] to raise that money.'" *Id.* Mr. LaRouche is still in federal prison serving a fifteen-year sentence for fraudulent fundraising and conspiracy to defraud the Internal Revenue Service. (App. 46a.)[5]

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[5] Mr. LaRouche and a number of his associates had previously been indicted by a federal grand jury in Boston for obstruction of justice resulting from an attempt to interfere with the grand jury's investigation of evidence of credit card and loan fraud in LaRouche's 1984 presidential campaign. After four months of trial, a mistrial was declared because of hardship to several jurors. *See United States v. The LaRouche Campaign*, 695 F. Supp. 1317 (D. Mass. 1988), *aff'd*, 866 F.2d 512 (1st Cir. 1989). Although a retrial was scheduled, the case was dismissed by the government after LaRouche was convicted in Virginia. (App. 51a.)

E. The Administrative Proceedings

On November 11, 1991, Mr. LaRouche submitted a letter of candidate agreements and certifications, together with a threshold submission, in an effort to establish his eligibility to receive public funds under the Matching Payment Act for the 1992 election cycle. Mr. LaRouche's candidate letter contained language designed to limit his personal responsibility under 26 U.S.C. § 9033(a) to furnish any requested financial records and other information to the Commission for review.[6] After the Commission's General Counsel concluded that this letter did not meet the requirements of 26 U.S.C. § 9033 and 11 C.F.R. §§ 9033.1 and 9033.2, Mr. LaRouche submitted a revised letter containing language that conformed to the statutory and regulatory requirements. (App. 23a.)

On December 19, 1991, the Commission made an initial determination, pursuant to 11 C.F.R. § 9033.10(b), that Mr. LaRouche was not eligible for federal matching funds. (App. 23a.) The Commission concluded that Mr. LaRouche's long record of fraudulent submissions and repudiation of promises in prior candidate agreements, along with his conviction and imprisonment for fraudulent fundraising from political supporters and for conspiracy to defraud another federal agency, established that the promises in his candidate agreement were inadequate to provide the assurances of compliance contemplated by the statute. (App. 23a-24a.) On January 2, 1992, the Commission issued its Statement of Legal and Factual Reasons for this decision. Mr. LaRouche submitted two responses to this Statement of Reasons and also provided

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[6] In paragraph VIII of his candidate letter, LaRouche promised only to produce such records "to the extent such receipts and disbursements pertain to my presidential primary campaign, and to the extent I or my authorized committee(s) have the legal authority to obtain and furnish such information." (App. 22a-23a, 53a.)

additional information requested by the Commission. (App. 25a.)

On February 27, 1992, after reviewing all the additional evidence and arguments, the Commission made a final determination, pursuant to 11 C.F.R. § 9033.10(c), that Mr. LaRouche had failed to establish his eligibility to receive federal matching funds for the 1992 election cycle. (App. 59a.) In its Statement of Legal and Factual Reasons (App. 19a-58a), the Commission found (App. 34a) that "all of Mr. LaRouche's various campaigns have demonstrated similar patterns of noncompliance, and in some instances fraud, and are consistent with the fraudulent fundraising practices that were the subject of his criminal conviction." The Commission concluded that Mr. LaRouche's conviction for fraudulent fundraising practices and consistent pattern of repudiated candidate agreements and fraudulent submissions to the Commission established "that the promises Mr. LaRouche makes in his new candidate agreement submitted pursuant to 26 U.S.C. § 9033 do not supply the kind of assurances of compliance with the law that Congress intended to require" (App. 56a).

F. The Court of Appeals's Decision

On March 3, 1992, Mr. LaRouche filed a petition in the United States Court of Appeals for the D.C. Circuit, pursuant to 26 U.S.C. § 9041, for review of the Commission's final determination denying him eligibility for matching payments for the 1992 election cycle.[7] On July 2, 1993, the court of appeals, one judge dissenting in part and concurring in part, reversed the Commission's determination, concluding that the

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[7] He and his committee also filed a motion for emergency relief and expedited briefing. The D.C. Circuit denied this emergency motion on March 17, 1992, concluding that "[p]etitioners have failed to demonstrate that the decision under review is subject to substantial challenge."

Matching Payment Act does not authorize the Commission to deny eligibility because it finds that a candidate's promises are unreliable.

The majority refused to defer to the Commission's construction of the statute because it found "the language, structure and purpose of the Act to be inconsistent with the Commission's interpretation" (App. 6a). The FECA, the majority noted (App. 7a), expressly grants the Commission authority to initiate enforcement proceedings for violations after certification. In contrast, the Matching Payment Act is silent regarding Commission authority to evaluate the reliability of candidate agreements by considering the candidate's past record of violating such agreements. From the statute's silence, the majority inferred (App. 7a-8a) that the Commission is precluded from making such a judgment. This restriction on the Commission's powers is necessary, the majority stated (App. 8a, 9a), to ensure that matching funds are distributed promptly and that the statute is administered in a nondiscriminatory manner. Moreover, in the majority's view, First Amendment considerations support judicially circumscribing the Commission's normal administrative authority to decide how to construe and administer the Act. (App.12a.)

Judge Wald dissented in part, concluding that "the statute gives the Commission the authority, if not the duty, to consider a candidate's filings and conduct in past publicly-financed campaigns when certifying her eligibility to receive further public funds" (App. 16a). Although Judge Wald believed that the Commission should not have relied upon Mr. LaRouche's criminal conviction because he had not been convicted of violating the campaign finance laws, she maintained that "the Commission was entitled to conclude that its own records documenting Mr. LaRouche's long trail of broken promises to the FEC revealed the requisite 'patent irregularities suggest-

ing the possibility of fraud.' " (App. 16a) (quoting *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 845-46 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)).

Judge Wald disagreed with the majority's view that the Commission had made a subjective assessment of Mr. LaRouche's character. Instead, she stated, the Commission had relied upon "objective and quantifiable evidence" that Mr. LaRouche "has filed false reports or defaulted on or repudiated his promises to the Commission in *four* consecutive elections" (App. 17a, emphasis in original). She also found that the majority's other concerns—delay and discriminatory treatment—were unwarranted. Because the Commission's inquiry would be based on information in the agency's own files, it would not involve a lengthy investigation prior to final certification. (App. 17a.) And "so long as the Commission bases its determination on specific, identifiable factors in the record, it is possible to review—and to ensure—the 'evenhanded[ness]' with which it applies the eligibility criteria to different candidates" (App. 17a).

Finally, Judge Wald pointed out that, under principles of deference, the silence of the statute on this issue supports rather than contravenes the Commission's construction. (App. 18a.) "The statute directs the Commission to certify a candidate only after he 'establishes' his eligibility, . . . not after he merely attests to it" (App. 15a). And she noted that the majority had agreed that the Commission could reject formally correct candidate promises in some circumstances:

> [T]he Commission is entitled to make the same determination not only as to a candidate whose statutory promises are contradicted by his whispered aside that he intends to welsh on his commitments . . . but also a candidate with documented overt acts of welshing on his similar commitments to the Commission in four out of four prior elections.

(App. 15a-16a.) Accordingly, Judge Wald would have remanded the case to the Commission to redetermine whether Mr. LaRouche was eligible, without relying upon his criminal conviction.

REASONS WHY THE PETITION SHOULD BE GRANTED

The Commission concluded in this case that the statutorily required promises submitted by Lyndon LaRouche were insufficient to establish his eligibility for public financing under the Matching Payment Act because of his persistent 15-year record of submitting fraudulent materials to the Commission in support of fund requests and repudiating or disregarding the *identical* promises submitted to obtain public funding in his four previous campaigns. This pattern of fraudulent activity in his quest for public funds was further confirmed by Mr. LaRouche's conviction and imprisonment for similar fraudulent fundraising from the public, and for conspiracy to defraud another federal agency, the Internal Revenue Service.

The court of appeals did not question the facts upon which the Commission relied. (App. 4a.) It ruled instead that the statute requires the Commission to certify for public financing *any* candidate satisfying the other eligibility criteria who submits the prescribed promises written in the proper form—no matter how lengthy, consistent, and purposeful the candidate's record of repudiating the same promises in past election campaigns. This decision eliminates the Commission's power to protect the public fisc from fraudulent manipulation even by applicants with established records of fraud like Mr. LaRouche, who is now assured of obtaining a new certification for public funds every four years, no matter how often he is found to have disregarded and repudiated his candidate agreements.[8]

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[8] The post-election recoupment procedures cited by the court below (App. 7a) are no substitute for the initial denial of the use of public funds

The decision of the majority below conflicts with the views of two other courts,[9] and runs contrary to this Court's view that " '[m]en must turn square corners when they deal with the Government,' " *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984) (quoting *Rock Island, A & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920)).

> This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds.

Id., 467 U.S. at 63. The court below turns this principle on its head by giving dispositive effect to the absence of explicit language in the statute "requiring that the 'agree[ments]' of

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to an applicant with a persistent pattern of fraud. Those remedial procedures are lengthy and complex, and at best will usually result in an enforceable order only several years later, *after* the candidate has already spent the federal funds to which he was not entitled. Moreover, if the candidate has no other financial resources when such a repayment order becomes final, the public funds may never be recovered.

[9] Because Commission determinations under the Matching Payment Act are directly reviewable only in the D.C. Circuit, 26 U.S.C. § 9041(a), there is no possibility of a direct conflict among the circuits on this issue. However, in rejecting an appeal brought by LaRouche against another party on a related issue, the Fourth Circuit agreed with the Commission's initial determination of ineligibility in 1984 (*see* p. 8, *supra*), finding that "the FEC legitimately concluded that LaRouche's § 9033(a)(3) agreement for the 1984 presidential election was inadequate" because of "LaRouche's failure to honor his § 9033(a)(3) agreement concerning the 1980 presidential election," *LaRouche v. State Board of Elections*, 758 F.2d 998, 1000 (4th Cir. 1985). A district court hearing a suit against the Commission by Mr. LaRouche's associates also found this decision to be "legally sound," *Spannaus v. FEC*, 641 F. Supp. 1520, 1526 (S.D.N.Y. 1986), *aff'd mem.*, 816 F.2d 670 (2d Cir. 1987).

§ 9033(a), or the certification of a commitment to adhere to campaign expenditure limits in § 9033(b)(1), be 'in good faith' or trustworthy" (App. 7a). This is a particularly perverse way to construe a statute like the Matching Payment Act, which is designed to reduce the potential for corruption of presidential candidates and election campaigns, and it disregards the general judicial recognition that government agencies have inherent authority to protect the integrity of their programs and procedures from abuse and fraudulent manipulation.[10] Congress need not enact explicit statutory language "to say anything so patent as that persons who have engaged in fraud . . . may be removed from the rolls." *Rush v. Smith*, 573 F.2d 110, 115 (2d Cir. 1978) (applying Aid For Dependent Children statute).

The court below acknowledged (App. 6a) that the Commission's construction of the statute (both in its regulation, 11 C.F.R. § 9033.4(b), and in its decision in this case) as authorizing consideration of a candidate's established record of fraudulent submissions in determining whether his newly submitted candidate agreement is adequate to "establish [ ]his eligibility" for public financing, 26 U.S.C. § 9036(a), is entitled to judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See also, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."). If the statute is "silent or ambiguous with respect to the specific issue," the court is limited to determining whether the agency has adopted "a permissible construction of the statute." *Chevron*, at 842-43. The agency's construc-

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[10] *See, e.g., S & E Contractors v. United States*, 406 U.S. 1, 15-16 (1972); *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393-94 (D.C. Cir. 1993).

tion must be accepted "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991).

The decision below exceeded these limits on judicial review by rejecting the Commission's construction of the Matching Payment Act without identifying any language in the statute or the legislative history expressing a contrary congressional intent on "the precise question at issue." *PBGC v. LTV Corp.*, 496 U.S. 633, 647 (1990). The court relied instead on "[t]he principle of *expressio unius*" (App. 7a), which is in any context " 'a questionable one in light of the dubious reliability of inferring specific intent from silence,' " *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2537-538 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n. 182 (1990)). Under *Chevron*, statutory silence requires deference to the agency, not rejection of the agency's construction. Thus, because "*expressio unius* [is] insufficient to establish unambiguous intent under *Chevron*," *Cheney Railroad Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir.), *cert. denied*, 498 U.S. 985 (1990), the courts "must defer to [an agency's] refusal to read the Act in the manner suggested by the *expressio* canon if its interpretation is otherwise reasonable." *Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991).

Even if the *expressio* canon were relevant generally to review of agency construction of statutes under *Chevron*, it is inapplicable to the Matching Payment Act. Congress's enactment of other post-election remedial procedures that could be used to address candidate actions that would also violate the promises in a candidate agreement does not evince an intention to preclude the Commission from denying eligibility to a candidate whose record of disregarding those promises is already established at the time he or she seeks eligibility for

federal funds. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting use of *expressio unius* canon to eliminate alternative remedies in construing a statute). As noted *supra*, p. 16, n.8, such post-election remedies are less effective in protecting the public fisc and the integrity of the statutory scheme and Congress expressed no intention that post-election remedies be considered exclusive. To the contrary, Congress explicitly provided a post-election remedy that supplements the Commission's authority under 26 U.S.C. § 9036(a) to determine in advance the amounts to be paid to eligible candidates.[11] This makes clear that Congress's provision of post-election remedies does not oust the Commission of authority to consider the same issues in making its initial determinations, when the record permits. "[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the 'direct[ ]' congressional answer required by *Chevron*." *Cheney Railroad*, 902 F.2d at 69 (emphasis in original).

The policy concerns cited by the court of appeals are equally unavailing under *Chevron*, both because they are general concerns that are not reflected in the language of the statute, and because they are inapplicable to what the Commission actually did here. The Commission did not, as the court apparently believed (App. 8a, 10a), deny eligibility to Mr. LaRouche on the basis of an evaluation of his overall character, nor did it discredit his statements on the basis of a subjective evaluation

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[11] The Commission's initial certifications of the amount a candidate is entitled to receive are to be reexamined in an audit after the election, 26 U.S.C. § 9036(b). If the Commission determines that the candidate received more than his or her proper entitlement, it can require repayment of the excess. 26 U.S.C. § 9038(b)(1).

of his demeanor. The Commission's rejection of Mr. LaRouche's candidate agreement was firmly based upon an objective record of his established pattern of disregarding and repudiating the *same* promises, which he had made four times before in the same circumstances—to obtain federal campaign financing under the Matching Payment Act. Such an objective record of prior fraudulent activity in identical circumstances is specifically relevant to determining whether LaRouche's current promises are fraudulent, and not merely evidence of his overall character.[12]

The Commission expressed no opinions about Mr. LaRouche's political positions or his fitness for office, and it expressed no view about whether he deserved anyone's vote. Some voters may have been influenced by this determination by the Commission, but *any* action taken against (or in favor of) a candidate by a governmental body may influence voters, and there is certainly nothing in the statute suggesting that the Commission should refrain from fulfilling its statutory duties when its decisions might hurt (or help) a candidate's election chances. The Commission's obligation during an election year, like that of any other governmental agency, is to administer and enforce the statutes within its jurisdiction, resolving issues that are relevant under the procedures established by Congress just as it did here. The Commission's performance of this role

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[12] *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused"); *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1233 (D.C. Cir. 1989) (concurring opinion of two judges) ("professions of future compliance are not credible when proffered by persons who have deliberately broken the law and lied to the [decision maker] in the past"); *United States v. Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), *cert. denied*, 474 U.S. 817 (1985) ("Evidence of . . . false testimony in other instances" is relevant to "specific intent to deceive and not merely evidence of . . . general bad character").

does not preempt the voters' ability to make their own evaluation of candidates any more than an Internal Revenue Service assessment for unpaid taxes or a traffic court's sentence for driving while intoxicated.

The remaining points relied upon by the court of appeals are contrary to this Court's precedents. The court of appeals opined (App. 8a) that Congress intended that funds be distributed under the Matching Payment Act "on a non-discriminatory basis" and that the Commission's construction of the statute "would imperil the assurance of evenhanded treatment." However, this Court has long recognized a strong "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and the court of appeals identified nothing in the 18-year history of the Commission that calls into question the evenhandedness of the Commission's administration of the Matching Payment Act.[13] Congress created the Commission and entrusted it with the responsibility to make public financing certifications, and it is not the function of the courts to restrict that authority on the basis of their own speculative concerns. As Judge Wald

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[13] Not only has the Commission certified a number of minor party candidates for public financing over the years, but it certified Mr. LaRouche himself in three election campaigns, going to great lengths in an unsuccessful effort to devise special procedures that would permit continued financing while adequately protecting against his fraudulent activities. *See* pp. 8-10, *supra*. As the Commission noted, violations of the campaign financing statutes have been committed by other presidential campaigns receiving public financing, but "[n]o other publicly funded candidate has established a pattern and practice of submitting false information to the Commission nor has another campaign admitted to knowing and willful violations . . . for submitting false or misleading information regarding contributions submitted for matching" (App. 54a). There is nothing discriminatory in "accord[ing] unique treatment to a unique application." *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 848 n.24 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

observed, in this area as with every other reviewable administrative decision, "so long as the Commission bases its determination on specific, identifiable factors in the record, it is possible to review—and to ensure—the 'even-handed[ness]' with which it applies the eligibility criteria to different candidates." (App. 17a.)

Finally, the court of appeals' reliance (App. 12a) upon "First Amendment concerns" identified in two of its own early decisions under the public financing statutes also contradicts this Court's precedents. The Commission's decision here did not interfere in any way with Mr. LaRouche's right to campaign for the presidency or his ability to raise and spend campaign contributions to advocate his election. The *only* effect of the Commission's decision was that Mr. LaRouche was denied a subsidy for these activities from public funds. For at least a decade this Court has held that a governmental decision "not to subsidize the exercise of a fundamental right does not infringe that right." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 n.9 (1986) ("there is no [constitutional] right to have speech subsidized by the government"). "Plainly, campaigns can be successfully carried out by means other than public financing; they have been [in the past] and this avenue is still open to all candidates." *Buckley v. Valeo*, 424 U.S. 1, 101 (1976). Whether or not the Commission abused its discretion in construing the Matching Payment Act to deny Mr. LaRouche eligibility for public financing is, therefore, a question of statutory construction not of constitutional right, and the First Amendment provides no basis for the court of appeals to disregard the limits of deferential review established by this Court in *Chevron*.[14]

[14] Both of the cases relied upon by the court of appeals, *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834 (D.C. Cir. 1979), *cert.*

In sum, the principle adopted by the court below—that absent express statutory language to the contrary, public funds can be obtained on the basis of agreements identical to those the applicant has repeatedly refused to honor in the past—not only violates the limits this Court has imposed upon judicial review, but conflicts with established principles essential to the effective protection of the public fisc. A decision that prevents the Commission from administering effectively a program designed by Congress to help ensure the integrity of our presidential candidates and campaigns is a matter of obvious national concern that should not be permitted to stand without plenary review by this Court.

The decision below is likely, however, to undermine the success of this important program in an even greater way. The availability of funds for the public financing of presidential campaigns rests entirely upon the voluntary designation by millions of individual taxpayers of a small portion of their taxes for this purpose. 26 U.S.C. §§ 6096, 9006, 9037.[15] Thus, the success of the federal campaign financing system in "eliminating the improper influence of large private contributions" on presidential candidates and "relieving major-party Presi-

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denied, 444 U.S. 1074 (1980), and *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538 (D.C. Cir. 1980), were issued prior to this Court's *Regan* and *Chevron* decisions, discussed in the text. Both cases affirmed Commission actions, but on the basis of the court's own construction of the statute, rather than by employing deferential review of the Commission's construction. Both cases also relied upon First Amendment concerns in devising restrictions on the Commission's authority that were not based upon statutory language. Of course, to the extent that these appellate decisions are inconsistent with this Court's later precedents, they are no longer good law.

[15] Because of existing shortfalls, Congress recently increased the amount of this designation from one to three dollars. *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title XIII, Part 5, Sec. 13441, 107 Stat. 567 (Aug. 10, 1993).

dential candidates from the rigors of soliciting private contributions," *Buckley v. Valeo*, 424 U.S. at 96, is uniquely dependent upon the public's confidence in the integrity of the program. The decision below, holding that the Commission is obligated to certify at least $100,000 in public financing to a candidate who has persistently engaged in fraudulent actions to obtain matching funds and is currently imprisoned for having conspired to defraud the Internal Revenue Service and his own contributors, can only diminish public confidence in the integrity of the program and discourage taxpayers from designating their tax dollars for this purpose. A decision with this sort of impact on the success of such an important public remedial statute warrants plenary review by this Court.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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